Supreme Court, U.S.
FILED
OCT 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-180

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ELBERT B. SCHINMANN AND TEDDIE SCHINMANN,
Petitioners,

VS.

THE UNITED STATES,
Respondent,

H.F. ALLEN ORCHARDS, et al.,
Petitioners,

VS.

THE UNITED STATES,
Respondent.

REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BURTON J. GOLDSTEIN
Counsel of Record
GOLDSTEIN, BARCELOUX & GOLDSTEIN
650 California Street, 25th Floor
San Francisco, CA 94108
Telephone No.: (415) 433-3000

BRYAN G. EVENSON
HALVERSON & APPLEGATE, INC., P.S.
311 North Fourth Street
P.O. Box 526
Yakima, Washington 98907-0526
Telephone No.: (509) 575-6611

Attorneys for Petitioners

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

Page

I

This is a case of first impression before this court as to whether the farmers' loss arose in a non-commercial" context which would make the misrepresentation exception inapplicable 1

II

This case does not involve weather forecasting 1

III

The United States' attempt to obscure the intolerable conflict between circuits fails 2

IV

Indian Towing Co. v. United States presents a clear and separate basis for liability 3

Conclusion 4

TABLE OF AUTHORITIES CITED

Cases

Indian Towing Co. v. United States, 350 U.S. 61 (1955) .. 3, 4

National Carriers, Inc. v. United States, 755 F.2d 675 (8th Cir. 1985) 2, 3

United States v. Neustadt, 366 U.S. 696 (1961) 1

REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

THIS IS A CASE OF FIRST IMPRESSION BEFORE THIS COURT AS TO WHETHER THE FARMERS' LOSS AROSE IN A "NON-COMMERCIAL" CONTEXT WHICH WOULD MAKE THE MISREPRESENTATION EXCEPTION INAPPLICABLE

The United States, at page 8 of its Memorandum in Opposition to the Petition for Certiorari (hereafter "Opposition"), concedes that "the extent to which non-commercial matters may trigger the misrepresentation exception remains an open question, and the court may in the future be presented with a case requiring further delineation of the line between commercial and non-commercial matters for this purpose."

This case presents such an issue for review. The damages sustained arose in a non-commercial context. The Farmers' loss arose through hydrological malpractice at the operational level, in the course of a special trust relationship.

Yet, the Ninth Circuit, as well as the United States, continues to confuse the issue by labeling the Farmers' loss as "economic" and "the result of a commercial decision." Appendix A, page 3. However, *United States v. Neustadt,* 366 U.S. 696, 711 n.26 (1961) does not sanction such a position. To the contrary, a proper reading of *Neustadt* mandates a holding that the Farmers' loss did not arise in a "commercial" context. *See* Petition for Writ of Certiorari, pp. 20-22.

II

THIS CASE DOES NOT INVOLVE WEATHER FORECASTING

The United States severely mischaracterizes this case by asserting that it is a forecasting case. As is clear from the pleadings and the various documents filed with the court below in this Petition for Writ of Certiorari, the Bureau simply incorrectly computed the extant water it had available in early 1977 in the

various reservoirs of the Yakima Project. *See* Petition for Writ of Certiorari, pp. 10-11.

When the Superintendent of the Yakima Office of the Bureau, William Gray, made his front page admission, "We blew it", he was not referring to weather forecasting.

> "There was water in the system that we didn't know we had, and hadn't computed before. It's as simple as that—we blew it." Appendix K, pp. A-144 through A-145.

As Judge Pregerson's concurrence to the Ninth Circuit's opinion pointed out, computing the water available under the Consent Decree "involved nothing more than the rote application of relatively straightforward mathematical principles involving no speculation, *forecasting,* or imponderables." Appendix A, pp. A-4 through A-5. (Emphasis Added). Clearly, this case does not involve weather forecasting.

III
THE UNITED STATES' ATTEMPT TO OBSCURE THE INTOLERABLE CONFLICT BETWEEN CIRCUITS FAILS

The United States fails in attempting to obscure the intolerable conflict between circuits which the Ninth Circuit decision in this case created. In one such attempt at obfuscation, the United States states that *National Carriers, Inc. v. United States,* 755 F.2d 675 (8th Cir. 1985) is distinguishable because plaintiff's injuries were not caused by plaintiffs' reliance on the misinformation, but "in other ways". Opposition, p. 5. However, in *National Carriers, Inc.,* the injuries resulted to plaintiff when plaintiff's employees relied on statements from a government meat inspector that the meat was "all the same", and, as a result commingled contaminated and non-contaminated beef. 755 F.2d at 676.

Yet, in *National Carriers, Inc.,* the court clearly held that it was the basic underlying operational negligence of the meat inspector which caused the harm, and thus mandated liability under the Federal Tort Claims Act (FTCA).

This case is indistinguishable from *National Carriers, Inc.* The Farmers' harm resulted from the Bureau of Reclamation's operational negligence (hydrological malpractice), not the announcement. The announcement was incidental. And, as in *National Carriers, Inc.*, the FTCA mandates liability in this case as well, notwithstanding the United States' protests to the contrary.

IV
INDIAN TOWING CO. v. UNITED STATES PRESENTS A CLEAR AND SEPARATE BASIS FOR LIABILITY

Indian Towing Co. v. United States, 350 U.S. 61 (1955) originated the "Good Samaritan" doctrine of FTCA liability, which presents a separate basis for liability herein. *See* Petition for Writ of Certiorari, pp. 16-17.

The United States, in a footnote, tries to brush aside the impact of *Indian Towing Co.* by stating that *Indian Towing Co.* did not address the FTCA exceptions. However, the reason *Indian Towing Co.* did not address these exceptions is that the government conceded the inapplicability of certain FTCA exceptions under the hornbook law "Good Samaritan" doctrine. *Indian Towing Co. v. United States,* 350 U.S. at 64-65. Thus, the government in *Indian Towing* was able to recognize what the government in this case does not: that the FTCA exceptions do not apply herein.

CONCLUSION

The United States thus cannot credibly deny the inconsistency of the Ninth Circuit's decision below with the precedents of this Court and of other circuits. Petitioners respectfully request that the Court grant *Certiorari,* and reject the United States' thinly veiled invitation to act "as a self-constituted guardian of the Treasury [to] import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States,* 350 U.S. at 69.

Dated: October 15, 1987

Respectfully submitted,

BURTON J. GOLDSTEIN
GOLDSTEIN, BARCELOUX & GOLDSTEIN

BRYAN G. EVENSON
HALVERSON & APPLEGATE, INC., P.S.

By BURTON J. GOLDSTEIN
Attorneys for Petitioners